STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELSINORE VALLEY EDUCATION ASSOCIATION, CTA/NEA	)	
Charging Party,	)	Case No. LA-CE-1968
v.	)	PERB Decision No. 696
LAKE ELSINORE SCHOOL DISTRICT	)	September 7, 1988
Respondent.	)	

Appearances; A. Eugene Huguenin Jr., Attorney, for Elsinore Valley Education Association, CTA/NEA; Parham & Associates, Inc. by James C. Whitlock for the Lake Elsinore School District.

Before Hesse, Chairperson; Craib and Shank Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeals by the Charging Party, Elsinore Valley Education Association, CTA/NEA (EVEA) and Respondent, Lake Elsinore School District (District). The administrative law judge (ALJ) found that the District violated sections 3543.5(c) and, derivatively, (a) and (b) of the Educational Employment Relations Act (EERA)[1] by unilaterally

[1]The Educational Employment Relations Act (EERA) is codified at Government Code sections 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Sections 3543.5(a), (b), and (c) state:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals

adopting and implementing the California Mentor Teacher Program prior to completion of bargaining with Charging Party over the subject. We affirm in part and reverse in part the decision of the ALJ for the reasons set forth herein.

FACTUAL AND PROCEDURAL SUMMARY

The Hughes-Hart Educational Reform Act of 1983 (SB 813)[2] established a California Mentor Teacher Program which authorized school districts to designate up to five percent of their certificated classroom teachers as mentors. The amount of the annual stipend is no less than $4,000 salary in addition to the regular salary for a full school year of service as a mentor teacher . (Education Code section 44494(a)) The duties and responsibilities of mentors are set forth generally in Education Code section 44496 and Title 5, California Administrative Code, section 11256.

District participation in the Mentor Teacher Program is optional. Education Code section 44494(d) makes a district's decision to participate nonbargainable.

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on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2]Article 4, sections 44490-44497 of the Education Code.

> . . . The subject of participation by a school district or an individual certificated classroom teacher in a Mentor Teacher Program shall not be included within the scope of representation in collective bargaining among a public school employer and eligible employee organizations.

State Superintendent of Public Instruction Bill Honig, issued an advisory memo dated November 11, 1983 that provided school district superintendents with information about State financing of the Mentor Teacher Program and recommendations for programmatic designs of individual district mentor teacher programs. Districts who wished to participate during the 1983-84 school year were required to file a noncommital letter of intent by December 15, 1983. The advisory memo further indicated that those districts who elected not to participate during the 1983-84 school year would be able to participate in subsequent years only if additional funds were appropriated by the Legislature.

On December 7, 1983, an Instructional Council meeting was held where it was announced that the Mentor Teacher Program would be discussed at the next meeting. Members were invited to read Honig"s advisory memo and be prepared to "brainstorm" ideas regarding program implementation. The minutes from the meeting quoted District Superintendent Ronald Flora as saying that the negotiable areas of the Mentor Teacher Program would be negotiated with EVEA.

On January 30, 1984 the State Department of Education issued a memo to county and district superintendents which established

March 15, 1984 as the deadline to submit applications for participation in the California Mentor Teacher Program during the 1983-84 school year. The memo required that the application contain the following information:

> A resolution of participation from the district governing board including evidence of the board's having considered parents, pupils, or other representatives in the selection process and a brief outline of the goals, purposes, and planned operation of the district's mentor program (see attached proposed Administrative Code regulation, Section 11250(a)). This should be a very brief description of district plans for implementing the program, and should include potential duties and responsibilities of mentor teachers. (See enclosed suggested form.)
>
> An assurance page, attesting to district apportionment of mentor stipends and administrative costs as provided in SB 813/1983. (Form enclosed.)

The memo further urged the District to use the then-proposed Title 5 regulations in the adoption of local practices for the program implementation.

Some time prior to January 17, 1984, Flora advised Denise Thomas, EVEA President, of the District's desire to meet and "set parameters" for the program. Thomas replied that discussions regarding the program were negotiable items and should be referred to the bargaining team.

On January 18, 1984 Flora addressed a memo to Judy Stewart-Monceaux, Chairperson of the EVEA negotiating team, requesting a meeting to discuss the "parameters" of the program. Monceaux responded by memo dated January 24, 1984, and stated that

since most aspects of the program were negotiable, the District should formulate and submit specific proposals through the statutory public notice process prior to the commencement of negotiations. Flora replied by letter dated January 25, 1984, that the District's obligation to bargain with respect to the implementation of the program was unclear and that his request to meet was an attempt to involve EVEA in the formulation of the program.

The Mentor Teacher Program was raised at the February 1, 1984 Instructional Council meeting. An unknown individual objected to the propriety of discussing the program and there was no further discussion on the matter.

On February 2, 1984 Flora announced by a memo to principals, learning specialists and Thomas that a February 8, 1984 meeting was scheduled to formulate procedures for the development of a spring 1984 Mentor Teacher Program. Thomas telephoned Flora and indicated that any discussion regarding implementation should be held at the bargaining table. On February 7, 1984 Flora issued a memo to principals which specified that the purpose of the February 8, 1984 meeting was to discuss a spring pilot utilization of mentor teachers and reminded them of the March 15, 1984 application deadline. The memo stated that teachers were invited to attend and give input in "formulating what our program might be."

Flora advised Thomas by letter dated February 8, 1984 of the receipt of additional regulations from the state. Flora proposed to negotiate issues regarding the Mentor Teacher Program with EVEA between February 22 - 24.

On February 8, 1984 the EVEA grievance team members circulated a letter to all teachers advising them not to attend the February 8 meeting.

Flora mailed Thomas a letter dated February 14, 1984 along with a draft copy of ideas (resolution) that were developed at the February 8 meeting. In the letter, Flora advised that the resolution would be presented to the board of trustees as information only.

The regular District board of trustees meeting was held on February 16, 1984 and the proposed resolution concerning the Mentor Teacher Program was presented. The public presentation of the proposed resolution was held February 17, 1984. On March 1, 1984 the District board adopted Resolution 1983-84-09, but postponed action on the plan to consider comments from the public.[3]

The parties met on March 1, 5, and 15. There was disagreement regarding the negotiability of various aspects of the Mentor Teacher Program. The parties met informally on March 16, 1984. The District proposed to bargain only over the stipend paid to mentor teachers. EVEA sought additional bargaining regarding: the procedure for selecting members of the mentor selection committee;

[3]Member Craib, in his concurrence and dissent asserts that the District implemented the Mentor Teacher Program and partially quotes the March 1 resolution. We believe that implementation is conditional upon "appropriate funding" and note that had the paragraph been quoted completely, it would state: "NOW, THEREFORE, BE IT RESOLVED that the Superintendent is directed to implement the mentor teacher program pursuant to Education Code Section 44491 and appropriate funding, beginning the second semester of 1983-84." (Emphasis added.) (Resp. Exh. 9.)

release time for committee members; mentor committee procedures for operations, classroom assignments, and length of appointment; and the scope of the duties and responsibilities of mentor teachers. No overall agreement was reached on any of these topics and there was no declaration of impasse.

On March 8, 1984 the District board met and approved the amended resolution for implementing the Mentor Teacher Program. Both the original resolution and amended resolution referenced aspects of the program which were subject to negotiations with EVEA.

On March 15, 1984, Flora sent a memo to all staff informing them that the Board of Trustees adopted a resolution to participate in the Mentor Teacher Program for Spring 1984. The memo outlined plans for nominating and electing the mentor teacher selection committee.

On March 30, 1984 an election was held for the mentor teacher selection committee. The District required a 60-percent teacher vote; however, since only 57 percent voted, no committee was formed.

The District received state funding for the Mentor Teacher Program in April 1984. Upon receipt Flora contacted EVEA to see if an agreement could be reached regarding implementation. There is no evidence that the parties met or reached an agreement or that the program was ever implemented.

On April 23, 1984, Charging Party filed an unfair practice charge against the District. The charge, as amended June 29, 1984, alleged that Respondent violated sections 3543.5(a), (b), and (c) of the EERA.

On August 2, 1984 the PERB general counsel issued a complaint which alleged that Respondent violated subsection 3543.5(c) by attempting the bypass EVEA and deal directly with employees and by unilaterally adopting and commencing implementation of a Mentor Teacher Program prior to the completion of negotiations or exhaustion of the impasse procedure. The complaint further alleged that the District's conduct in both instances constituted derivative violations of sections 3543.5(a) and (b).

PROPOSED DECISION

In determining the negotiability of the Mentor Teacher Program pursuant to section 3543.2(a), the ALJ relied on San Mateo City School District (1980) PERB Decision No. 129 and the relevant statutory sections set forth in Education Code sections 44490 - 44497. The ALJ concluded that Education Code section 44494(d) precluded negotiations on the subject of participation. However, the ALJ pointed out that since the relevant Education Code sections contain both enumerated and nonenumerated subjects, certain aspects of the program that were discussed during the March 1984 negotiations are within the scope of bargaining. (San Mateo City School District (1983) 33 Cal.3d 850, 864; Mt. Diablo Unified School District (1983) PERB Decision No. 373.)

The ALJ granted the District's motion to dismiss insofar as it addressed the bypass allegation. The ALJ concluded that EVEA offered no evidence that the teacher input received was actually used by the District in the adoption of the Mentor Teacher Program, or that the District intended by its action to avoid negotiations or undermine the Union.

The ALJ concluded that the District violated its duty to bargain in good faith with EVEA by adopting Resolution 1983-84-09, which outlined the implementation plan for the Mentor Teacher Program, prior to the conclusion of negotiations.

The District's affirmative defense of operational necessity was rejected by the ALJ based upon the finding that there was no showing of an actual emergency, which leaves no real alternative to the action taken and allows no time for meaningful negotiations before the action is taken. (San Francisco Community College District (1979) PERB Decision No. 105; Calexico Unified School District (1983) PERB Decision No. 57.)

The District filed exceptions to: the date upon which the bargaining obligation arose; the negotiability of certain areas of the Mentor Teacher Program; the ALJ's rejection of its operational necessity defense; and the ALJ's conclusion that the District did not negotiate in good faith.

Charging Party excepted to the ALJ's conclusion that EVEA failed to prove that the District attempted to bypass the EVEA by bargaining directly with unit employees.

DISCUSSION

In light of the entire record, the only issue before the Board is when did the obligation to bargain attach?

We hold that the ALJ incorrectly concluded that the District's obligation to bargain arose when it adopted the resolution outlining the Mentor Teacher Program on March 1, 1984 . The adoption of

Resolution 1983-84-09 by the District was nothing more than an exercise of its statutory right to decide to participate in the program, pursuant to Education Code section 44494(d).

We believe that given the fact that the California Mentor Teacher Program was a new concept,[4] the series of discussions the District held or attempted to hold with the Instructional Council, EVEA, and individual unit members were intended to assist the District in determining whether or not participation in the program was feasible. Indeed the District attempted to "brainstorm" and "set parameters" as early as December, 1983 in response to Honig's November, 1983 advisory memo.

We reject the ALJ's conclusion that the District's plan for implementation of the Mentor Teacher Program was not required by the state as part of the formal application process. The January 30, 1984 correspondence from the State Department of Education to district superintendents specifically required the March 15 application to include a resolution from the governing board including evidence of consideration of the views of parents, pupils, and other representatives, and a statement of program goals and purposes (including planned operation for implementation of the program which should outline the potential duties and responsibilities for mentor teachers as stated in Education Code

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[4]The California Mentor Teacher Program, codified in Education Code sections 44490-44497 became effective July 28, 1983. Regulations were filed with the Secretary of State on March 26, 1984,

section 44496).[5] The memo further indicated that a technical assistance guide outlining suggested approaches and procedures for planning, implementing, supporting, and institutionalizing district mentor programs would be distributed to all districts in March 1984.

We find that there was no action taken by the District which affected matters within the scope of representation in that, once the funds for program implementation were received, the District contacted EVEA to determine if an agreement could be reached. There is no evidence that the parties met or reached an agreement. The state's approval of the District application and subsequent grant of funds for the program implementation in April, 1984 triggered the bargaining obligation.[6]

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[5]The January 30, 1984 memo from the State Department of Education specifically contemplates detail in the formal application for participation in the Mentor Teacher Program. The dissent, in footnote 1 on page 15 quotes the above-referenced memo and places emphasis on the requirement of a "very brief description" of district plans for implementing the program. However, we note that the remainder of the sentence requiring a "description of potential duties and responsibilities" of mentor teachers is omitted.

[6]Member Craib cites Mt. Diablo Unified School District (1983) PERB Decision No. 373 and Oakland Unified School District (1985) PERB Decision No. 540 in support of his assertion that an employer may implement a non-negotiable decision if it has provided sufficient time to bargain prior to the implementation and continues to bargain in good faith thereafter. We note that the above cases are distinguishable in that the district could implement its (layoff) decision on its own initiative once the bargaining obligation had been satisfied. Here, the District could not implement the Mentor Teacher Program without state approval and funding.

Education Code section 44494(d) would be effectively nullified, despite clear language that the subject of participation by the district is nonnegotiable, if we concluded the obligation to bargain negotiable aspects of the Mentor Teacher Program attached prior to state approval and funding. Districts would then be bound to negotiate the subject of participation to impasse or reach an agreement at the risk of being held in violation of EERA section 3543.5(c).

Therefore, we would reverse the ALJ's proposed decision insofar as it relates to the ALJ's conclusion that the District violated its duty to bargain in good faith by adopting Resolution 1983-84-09. We affirm the ALJ's analysis and conclusions regarding the negotiability of the Mentor Teacher Program, the operational necessity defense, and the alleged bypass of the exclusive representative and dismiss the complaint on the specific basis that the District's conduct amounted to deliberating whether or not to participate in the Mentor Teacher Program.

ORDER

For the foregoing reasons the unfair practice charge in Case No. LA-CE-1968 is DISMISSED.

Chairperson Hesse joined in this Decision.

Member Craib's concurrence and dissent begins on page 13.

Member Craib, concurring and dissenting: I concur in the affirmance of the ALJ's dismissal of the allegation that the District unlawfully bypassed EVEA by negotiating directly with unit members. I also concur with the dismissal of the allegation that the District violated its duty to bargain the implementation of the Mentor Teacher Program (Program). However, I must dissent from the analysis used by the majority in dismissing that allegation.

The linchpin of the majority's analysis is its conclusion that the bargaining obligation did not arise until the District received state approval and funding in April of 1984. The majority reasons that the District's actions prior to that time amounted to no more than deliberations on whether or not to participate in the Program. As I will explain below, the majority's holding is not only incorrect, it is patently absurd.

As noted by the majority, Education Code section 44494(d) exempts a school district's decision to participate in the Program from the scope of representation. The ALJ, in her proposed decision, correctly analogized this situation to those where the Board has held that, while managerial prerogatives dictate that a decision is non-negotiable, the effects of that decision are negotiable. See, e.g., Mt. Diablo Unified School District (1983) PERB Decision No. 373 (layoffs); Alum Rock Union Elementary School District (1983) PERB Decision No. 322 (establishment or abolition of classifications). Thus, the effects of the decision to participate in the Program (i.e.,

its implementation) are negotiable to the extent they touch upon otherwise negotiable matters. Further, it is well-established that the duty to bargain effects arises when the employer reaches a firm (non-negotiable) decision. Mt. Diablo, supra.

While my colleagues appear to accept the above analytical framework, they inexplicably conclude that the District did not decide to participate in the Program until its application was approved and funding was disbursed. In reality, the record conclusively reveals that the District made its decision much earlier and that the District board of trustees formally approved the decision to participate in the Program on March 1, 1984, when it passed a resolution to send its application to the State Department of Education. The majority ignores the facts that the District has asserted throughout these proceedings that it actually made the decision to participate well before March 1, and unsuccessfully tried to reach agreement with EVEA on the implementation of the Program. The majority also ignores the evidence that the District actually began to implement the Program in March of 1984 without having reached agreement with EVEA.

The District first sought discussions with EVEA in January 1984 (to "set the parameters" of the Program). The parties did not actually meet until March 2. That meeting, as well as further sessions on March 5, 15, and 16, failed to resolve the

parties' differences. There was disagreement as to both the appropriate terms and the overall purpose of the Program.

On March 1, the board of trustees adopted a resolution setting forth a plan for operation of the Program. That resolution, which was quite general in nature, stated that the amount of time a mentor teacher would spend on regular teaching assignments would be subject to negotiations with EVEA.[1] On March 8, the board of trustees adopted an amended implementation plan which was more detailed than the March 1 resolution. Shortly thereafter, the application was submitted to the State Department of Education. The March 8 amended resolution stated that the stipend for mentor teachers and the procedure for mentors to return to their former assignments was to be subject to negotiations with EVEA. The March 8 resolution included procedures for electing a selection committee and for selecting the mentor teachers. The board of trustees also conditioned further implementation upon a 60 percent turnout in the election of the selection committee.

On March 15, District Superintendent Ronald Flora distributed a memo to teachers announcing a pilot program and

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[1]A January 30, 1984 memo from the State Department of Education established March 15, 1984 as the deadline for submitting applications for participation in the Program (the deadline was later extended to April 2). The application was to contain a resolution of the governing board with a "brief outline of the goals, purposes, and planned operation of the mentor program . . . . This should be a very brief description of district plans for implementing the program . . ." (emphasis added).

describing the selection and application process. On the same date, the District distributed a flyer which described its Program and specified the terms and conditions of the positions in great detail, including duties, qualifications, length of service (4/6/84 - 6/30/84), and stipend amount. The election for the selection committee was held on March 30 as scheduled but, given the turnout of less than 60 percent, the selection committee was never established. Similarly, the District aborted the application process; though a number of teachers applied, no one was interviewed. When funding was received from the State some time in April, the District again contacted EVEA to see if an agreement could be reached, but the record is silent as to what transpired thereafter.

As is indicated from the brief synopsis of events provided above, the record is replete with evidence that the District made a firm decision to participate in the Program by March 1, if not earlier. The District's actions through the first three months of 1984 simply cannot be reconciled with the majority's view that no decision was made until some time in April. Beginning in January, the District acknowledged an obligation to bargain (at least as to some subjects) and actually negotiated with EVEA on four separate occasions in March. On February 17, the District posted a public notice concerning the Program. The notice stated, in pertinent part:

> Be it hereby noted that the Lake Elsinore School District has proposed the following subject for negotiations:
>
> The Lake Elsinore School District proposes to implement a Mentor Teacher Program for the spring semester, 1984. The District proposes that employees selected to the Mentor Teachers be paid a stipend of $2,000.

The March 1 resolution of the board of trustees begins by stating:

> WHEREAS, the Governing Board of the Lake Elsinore School District has elected to participate in the California Mentor Teacher Program . . . (emphasis added).

It ends by stating:

> NOW, THEREFORE, BE IT RESOLVED that the Superintendent is directed to implement the mentor teacher program . . ., beginning the school semester of 1983-84 (emphasis added).

The superintendent did, in fact, begin to implement the Program formally adopted on March 1 and March 8, as evidenced by the March 15 memo and flyer and the selection committee election held on March 30. While it stretches the imagination to assert that a formal resolution to participate is not a firm decision, it is wholly nonsensical to claim that the District had not made a firm decision when it had already begun implementation!

The majority argues, without explication, that Education Code section 44494(d) would be effectively nullified if the bargaining obligation arose prior to state approval and funding. The only clue to the majority's analysis is its conclusion that school districts would then be bound "to

negotiate the subject of participation to impasse or reach an agreement at the risk of being held in violation of EERA section 3543.5(c)." This, of course, is a non sequiter. A school district would not be obligated to bargain the decision to participate regardless of whether or not the obligation to bargain arises before state approval and funding. Nor would effects bargaining prior to funding be deleterious to any party's interests. Just the opposite is true.

The holding that actual funding of the proposal triggers the bargaining obligation would undermine the entire bargaining process and adversely affect the interests of all concerned. The majority's rule would logically apply to a wide array of projects or programs undertaken with categorical funds which must be approved by outside governmental entities. Normally, a school district desires to and is prepared to expend those funds as soon as they are received. The majority's rule would delay such implementation until the bargaining obligation is satisfied. This, of course, would frustrate the school district's desire to implement a particular program and, in so doing, interfere with its right to make non-negotiable decisions (such as the one involved herein pursuant to Education Code section 44494(d)). Moreover, such a rule, by postponing bargaining, would have the effect of shortening the time available for bargaining (i.e., that time period preceding when the employer can lawfully implement even absent agreement

— see discussion infra), thus making such bargaining less meaningful. In sum, the majority's holding is not only contrary to the evidence in the record (not to mention contrary to the District's own assertions as to when it made a firm decision), but it will have just the opposite effect from that purported in the majority opinion.

I now turn to the real issues in this case, which are as follows:

1) Did the District's actions in March 1984 constitute implementation of negotiable matters prior to agreement with EVEA?

2) Did the District nonetheless satisfy its bargaining obligation by providing sufficient time to negotiate prior to implementation and by otherwise bargaining in good faith?

The record is clear that the four negotiating sessions between the parties did not result in an agreement. The District claims that a State Department of Education directive required the March 1 and 8 resolutions and thus those actions should be excused. As noted above, at footnote 1, a resolution was required, but it need only contain "a brief outline of the goals, purposes and planned operation of the district's mentor program . . ." Thus, the March 15 deadline for filing the application with the State did not require that a detailed plan be formally adopted by that date. The March 1 resolution was general in nature and clearly was consistent with the above requirement. The March 8 amended resolution, however, was a

very detailed description of the planned Program, which clearly exceeded the specificity required by the State directive.[2] Consequently, The State directive itself did not justify the action.

EERA section 3543.2(a), which sets forth the scope of representation, states, in pertinent part:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees . . . .

The resolution, as amended on March 8, expressly made subject to negotiations only the stipend amount and the procedure for return to regular teaching assignments. It set out with specificity the procedures for electing members of the selection committee and for selecting mentor teachers, the procedures for applying to become a mentor teacher, the term of the appointment (one year), release time for members of the selection committee. It also states that the "duties and responsibilities of mentor teachers shall be approved by the board of trustees and shall be consistent with Education Code Section 44496."

2The two resolutions are appended hereto as attachment A. The first two pages represent the March 1 resolution and the last three pages represent the March 8 additions.

Clearly, several matters expressly addressed in the March 8 amended resolution touched upon negotiable matters (in affirming the ALJ's conclusion with regard to the negotiability of the Program, the majority apparently agrees). For example, release time for selection committee members obviously has an impact on hours, an enumerated subject. Likewise, procedures for selection of mentor teachers, including those for election of the selection committee are negotiable due to their direct relation to transfers and reassignments. Healdsburg Union School District (1984) PERB Decision No. 375 (procedures for granting promotions). Finally, duties and responsibilities are negotiable to the extent they affect hours or workload. Davis Joint Unified School District (1984) PERB Decision No. 393. See, also, Anaheim Union High School District (1981) PERB Decision No. 17 7.

It must also be pointed out that the March 8 resolution, by its terms, represented a veritable fait accompli. It is clear that the District, through this resolution adopted a comprehensive implementation plan whose only concessions to negotiability were as to stipends and reassignment. The District's actions thereafter (the March 15 memo and flyer and the March 30 election) reflect merely the actual execution of the plan adopted March 8. The March 15 flyer soliciting applications went even further than the March 8 resolution, in that it specified unequivocally the stipend amount, the amount

of release time for mentors, and the duties and responsibilities of the mentors. In sum, the record is clear that, as of March 8, the District embarked upon the implementation of a mentor program (though the implementation was later aborted due to the low turnout in the selection committee election). Therefore, the District violated its duty to bargain the implementation of the Program, unless it had, by March 8, already satisfied its duty to bargain to the extent necessary to allow lawful implementation to begin.

Though the District began implementation of its Mentor Program prior to completion of negotiations, Board precedent indicates that, at least in some circumstances, an employer may go ahead and implement a non-negotiable decision, as long as it provided sufficient time to bargain prior to the implementation and continues to bargain in good faith thereafter. In Mt. Diablo Unified School District (1983) PERB Decision No. 373, the Board held that, given the notice requirements of Education Code sections 44949 and 44955 (final notice of layoff must be given by May 15 or employees automatically reemployed), the district would have been justified in implementing layoffs by May 15 had it bargained in good faith during the period between the date of its decision to lay off and May 15 (four months). The Board noted that the district would have been obligated to continue to negotiate those in-scope effects not necessarily determined by the implementation.

In Oakland Unified School District (1985) PERB Decision No. 540, the Board held that the passage of a resolution setting a date for the implementation of layoffs two months hence was not a per se violation of the duty to bargain, because it provided ample opportunity for good faith negotiations to take place prior to implementation and the date set was not arbitrary. However, in that case, as in Mt Diablo, the Board found that the District did not negotiate in good faith prior to implementation.

While neither Mt. Diablo nor Oakland involved a situation where the employer did bargain in good faith for a reasonable period and then went ahead with implementation, I would find no violation under such facts and would set out the following test. An employer may lawfully implement a non-negotiable decision prior to the completion of negotiations on the effects of that decision if:

1. the implementation date chosen is not an arbitrary one, but is based upon either an immutable deadline (such as one set by the Education Code or other laws not superseded by the EERA) or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the non-negotiable decision; and
2. notice of the decision and implementation date is given sufficiently in advance of the implementation date to

allow for meaningful negotiations prior to implementation; and

3. the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation.

The above test, I believe, recognizes the employer's right to make a non-negotiable decision, while also ensuring that meaningful effects bargaining takes place. The indefinite postponement of implementation would effectively undermine the employer's right to make the decision and would blur the distinction between decision and effects bargaining. On the other hand, certain restraints must be put on the time of implementation for the simple reason that effects bargaining is much more meaningful if it takes place prior to implementation.

Turning to the instant case, I find that the District's implementation date was properly based upon an important managerial interest.[3] The March 1 and March 8 resolutions reflect the District's earlier decision to begin a mentor program as soon as funding became available (April). The initial Program was to begin in April and run through June and then begin on a yearly basis the subsequent fall (while the

[3]As stated earlier, I reject the District's argument that the March 15 application deadline required a complete implementation plan by that date.

actions after March 8 were specific to the spring 1984 Program, the resolutions on their face apply to an ongoing Program). I would conclude that, since the District had clearly been given the unilateral right to decide to participate in the Program, it had the concurrent right to begin participation as soon as the Program became available. Moreover, a November 1, 1983 directive from the State warned that a failure to participate in the second half of the 1983-84 year would make participation thereafter dependent upon the provision of additional funding.

As found by the ALJ, the District first communicated its desire to negotiate with EVEA some time prior to January 17, 1984. Consequently, there was a period of at least seven weeks in which to conduct negotiations prior to implementation. If, as found by the Board in Oakland, supra, eight weeks is ample time to conduct meaningful negotiations, it follows that seven weeks is also sufficient.[4] In addition, it is instructive to note that the Mentor Program was a new one and the State Department of Education had to complete promulgation of regulations and provide the appropriate directives before the Program could become a reality. This had the effect of

[4]Implicit in this finding is that the bargaining obligation had arisen by that time, as a firm decision to participate was evidenced by the District's willingness to negotiate. The decision, of course, was to be formally adopted later by the board of trustees as required by the application process.

compressing the time available for negotiations prior to implementation of spring 1984 Programs.

Lastly, the District's conduct during the seven plus weeks prior to implementation must be examined to determine if it reflects the requisite good faith. The most troubling piece of evidence is that only two negotiating sessions took place (March 2 and 5) prior to implementation. However, the record does not reflect that the delay was the fault of the District. The District sent letters to EVEA on January 18, January 25, and February 8 suggesting that the parties discuss the Program. Though the February 8 letter suggested dates of February 22-24, it is unclear why the parties did not meet until March 2. While it appears that neither party insisted upon immediate negotiations (though the impetus for negotiations did come from the District), the District was at all times willing to meet and cannot be held accountable because EVEA did not demand more immediate negotiations.

There is one other aspect of the District's conduct that is somewhat troubling but, upon closer examination, it is inconsequential. In his letter of January 25, Superintendent Flora backed away from his earlier admission that most aspects of the Program were negotiable. Instead, he claimed that "it is unclear exactly what, if any, bargaining obligation school districts have with respect to . . . the Program." Additionally, the District's February 17 public notice referenced only the stipend amount, and testimony established

that the District continued to raise questions at the table about the negotiability of the Program. While the District may have taken a very narrow position as to the scope of negotiable subjects, the testimony made it clear that the District nonetheless was willing to negotiate over a broad range of subjects. It is not uncommon for employers' representatives to deny negotiability but nonetheless be willing to negotiate those subjects when actually at the table. The important inquiry is not as to the District's words, but its actions. The record reflects that those actions were not inconsistent with good faith bargaining.

In conclusion, I find the majority's analysis to be basically nonsensical, as this case is much more complex than my colleagues are apparently willing to recognize. Nonetheless, after applying what I believe to be the better analysis, I, too, conclude that the charge must be dismissed.